No. 115

Supreme Court of the United States

OCTOBER TERM, 1916

JOSIE C. BAKER,

Individually, and as Administratrix of Charles Baker, Deceased,

Plaintiff in Error,

vs.

BAKER, ECCLES & COMPANY

and

AUGUSTA H. BAKER,

Individually, and as Administratrix of Charles Baker, Deceased,

Defendants in Error.

In Error to the Court of Appeals of the State of Kentucky.

Supplemental Brief of Plaintiff in Error.

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SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

May It Please the Honorable Court:

This case was before the Court at the last term on motions of defendants in error to dismiss, or to affirm, which motions were denied.

In opposition to these motions, plaintiff in error filed a brief stating the facts and discussing pretty fully the principal question in the case.

This is the gray-backed brief, is still relied on, and it is only intended now to supplement it —not to repeat it in any part.

Defendants in error have recently filed a short brief (the yellow-backed one), and it is our purpose, first, to correct some errors in that brief.

ERRORS IN LAST BRIEF OF DEFENDANTS IN ERROR.

Counsel for defendants in error appear not to be always mindful of either the exact facts of the case or the real and only question presented for decision here.

In the two pages of the brief devoted to "the facts", emphasis is placed on alleged facts which it is said appear in part from the opinion of the Kentucky Court of Appeals and in part from the Kentucky record (though the record is not cited), concerning the *place of domicile* of Charles Baker.

It is quite apparent that these facts are not at all pertinent here. The only question involved here is whether the Kentucky Court of Appeals gave proper force and effect to the *judgments of the Tennessee Chancery and County Courts, adjudging that the domicile was in Tennessee.* It

matters not at all what appears either in the Kentucky record or in the opinion of the Kentucky Court of Appeals *on that question of fact.* That question of fact was decided and concluded by the Tennessee judgments, and the only question here is whether those judgments were entitled to full force and effect in Kentucky. Adversaries seem occasionally to overlook this distinction, which, of course, should be kept constantly in mind.

Counsel for defendants in error also erroneously state, on page 4 of their last brief, that plaintiff in error's position in the Courts below on the effect of the judgment of the *Tennessee County Court* as to domicile *has been abandoned.* Really, the quotation made on page 4 from our brief on this point shows counsel's mistake. It there appears that we stated that we did not "emphasize *on this motion* that aspect of the case", and for the reasons stated; that is, on the motion to dismiss or affirm. That was not, we respectfully submit, an *abandonment* of that aspect of the case; and although it is of subordinate importance, in view of the more formal and elaborate consideration and decision of the same question by the Tennessee *Chancery Court,* we shall nevertheless, in the course of this brief, take occasion to develop and emphasize it.

It must be obvious that the elaborate and somewhat involved argument, on pages 6 to 10 of the brief, based on Story's Conflict of Laws and the case of *Harvey* v. *Richards*, 1 Mason, as to *where* the personal property of a decedent *is to be administered*, can have no force here; for no such question is presented here. The question, even in the Courts below, in this case, was never as to *where* the personalty of a decedent is to be *administered*, but was as to whom it is *to be distributed*—in other words, the question was one of *distribution* rather than of *administration*. That administration was proper in both States —the decedent having personalty in both States —was conceded on both sides from the beginning.

The third division of the argument of defendants in error, beginning on page 10 of the last brief, forcibly illustrates the lapse of counsel's attention from the only question here involved. The point there made is, that *the Kentucky Court* decided the domicile to be in Kentucky, and the whole argument is built up on this point, which is sought to be buttressed by the authorities cited on the *place of administration or distribution*. Counsel seem altogether to overlook the fact that if the decision of the question of domicile *by the Tennessee Courts* was of force in Kentucky (which is the question and the sole question

here), then the Kentucky Court *was thereby precluded from any re-examination of it.* The argument is a mere begging of the question.

As to the point that a *domiciliary* personal representative takes *title* to all the intestate's personality, wherever situated, and that *corporate stocks,* for the purpose of administration and distribution, are to be regarded legally as located at the owner's domicile at the date of his death —these will be treated later in this brief.

The last point made in this last brief of defendants in error is, that the "decision of the Kentucky Court was right". No authority whatever is cited, and the only answer we wish to make here to these three pages of argument is to correct some mistakes of fact contained in them, and to note the fact that the *judgment* of the McCracken County Circuit Court, in Kentucky, to the effect that Charles Baker was domiciled in Kentucky, and on which much of this argument is based, was held by the Kentucky Court of Appeals to be *absolutely void*—and that decision is not reviewable here.

The brief says, on page 14:

> "At the instance of the plaintiff in error the Kentucky Court reopened its former judgment and again examined the question

of domicile, and in doing so sought and obtained exhaustive proof upon the controverted fact."

All we can say of this, with due courtesy, is that it is a mistake, and that the record contains no warrant for such a statement. On the contrary, the whole record shows that throughout the case the plaintiff in error relied upon her Tennessee judgments as concluding the question of domicile. This contention of plaintiff in error was thus stated in the opinion of the Court of Appeals. (Pr. Rec., p. 88):

> "In behalf of Mrs. Josephine Baker the argument is made that the Tennessee judgments finding that Charles Baker died a resident of Tennessee are conclusive on this question, and this being so, his widow, under the law of Tennessee, about which there is no dispute, was and is entitled to the whole of his surplus personal estate."

And again, on page 94, with reference to the Chancery judgment:

> "On this issue counsel for the widow urgently insist that this Tennessee Chancery judgment, standing as it does unmodified and unreversed, conclusively settled not only in Tennessee, but everywhere every question determined by it affecting parties

> who were before the Court by actual or constructive service, and therefore its operation and effect could not be called in question when suit was brought on it in this State."

It is thus seen that there is no basis for the statement quoted from the brief of adversaries on this point.

On the same page (14) of the brief, it is also said:

> "The Kentucky Court *had custody of the property*, and it appears of record all interested distributees were before the Court. Having custody of the property of the persons interested, why should it forego the right to determine, at the instance of its own citizens, the disputed fact?"

This is also a mistake. The Kentucky Court *had not the custody of the property.* No property was impounded in the suit in any way. The "property" involved consisted of certain shares of stock in the corporation of Baker, Eccles & Co., and certain indebtedness of that corporation to the deceased, Charles Baker. The plaintiff in error had possession of the certificates of stock, duly transferred to her by orders of both the County and Chancery Courts of Hardin County, Tennessee, and she brought her suit in Kentucky against that corporation alone to compel it to

transfer the stock to her on its books, and to recover the debt owing to her husband's estate by the corporation. This was the character of the suit at its inception. The intervention in the case by the mother, Augusta H. Baker, on her own petition, brought into the litigation the question of the effect of the Kentucky judgment in her favor (subsequently held void), but it brought no *property into the custody of the Court.* As to the *legal situs,* for the purpose of distribution, of this corporate stock and this indebtedness—that is another question, to be considered in its proper place. Certainly, as we have said, the property of Charles Baker's estate was not *in the custody of the Court*—even if that were material, and it is not, as we think.

Again, on the same page (14) of the brief, counsel for defendants in error very complacently state that they "conceded" that plaintiff in error was not before the Court by constructive service in Mrs. Augusta H. Baker's suit in Kentucky. This is also a mistake. They made no such concession, but strenuously urged the contrary. This question is fully discussed and decided in the opinion of the Court of Appeals, pages 88 to 91, of the printed record, where the contentions of counsel for defendants in error in support of the Kentucky judgment are fully stated by the Court.

Only one other extract from the brief of defendants in error will be made, and this only because it illustrates the strange mental confusion into which learned counsel have fallen with respect to the question to be decided here.

On page 15 they say:

> "The Kentucky Court, having custody of the property of the decedent in an action commenced before any foreign judgment was obtained, is asked to surrender its jurisdiction and to forego a determination of the litigated matter because a foreign Court had *first* determined the question, determined it in an action where the Kentucky distributees were not served with process and did not appear."

It is difficult to catalogue or schedule the numerous errors and misconceptions involved in this brief extract. The mistaken assumption that the Court *had custody* of the property we have already noticed. The "action" referred to is the Kentucky suit of Augusta H. Baker, the judgment in which the Court of Appeals held was *absolutely void.*

It was, presumably, the Court having cognizance of this action of Augusta H. Baker that it is here said had custody of the property "before any foreign judgment was obtained", and which

it is said was "asked to surrender its jurisdiction and forego a determination of the litigated matter", etc.

Now, that suit of Augusta H. Baker was finally ended by *final* judgment (void though it was) on the 13th day of February, 1913 (Printed record, pp. 33-4, petition of Augusta H. Baker), while the present suit was not commenced until June 21, 1913 (Pr. Rec., p. 1), and the judgment of the Tennessee Chancery Court was not pronounced until May 2, 1913 (Pr. Rec., p. 24).

So that the "action" referred to by counsel, in which the Court, it is said, was "asked to surrender its jurisdiction and to forego a determination of the litigated matter", had been finally determined and the Court's jurisdiction of it exhausted more than four months before the present suit was commenced, and nearly three months before the Tennessee judgment was pronounced.

But even this is not the most remarkable feature of the extract. It assigns the reason why the Court in the action referred to was asked to surrender its jurisdiction and forego a determination of the litigated fact to be, "because a foreign Court had *first* determined the question"—the italics are by the authors of the brief. It starts out with a "Court having custody of the

property of the decedent in an action commenced *before* any foreign judgment was obtained", and marvels why such a Court having such custody should be asked to *surrender its jurisdiction* and *forego a decision of the question involved,* and yet, before it gets to the end of the sentence, it crosses itself and discloses the assumption that the "foreign Court had *first* determined the question".

We refrain from further comment. It is only by such confused reasoning as this that this judgment of the Court of Appeals is sought to be sustained.

FORCE AND EFFECT OF THE TENNESSEE COUNTY COURT JUDGMENT.

We pass next to the force and effect which should be given in Kentucky to the Tennessee County Court judgment, which we did not emphasize in our principal and former brief.

The facts on this point are sufficiently stated in the opinion of the Court of Appeals, at pages 84-5, and there is no dispute of the fact that the County Court of Hardin County, Tennessee, *actually adjudged* that the domicile of Charles Baker at his death was in that county and State; nor is it disputed that that Court was a Court

of *distribution,* as well as of probate and administration, and that it was *necessary* for it to determine such domicile before it could exercise its jurisdiction to order *distribution.* The full proceedings of that Court appear at pages 50-58 of the printed record, showing appointment, bond, letters, inventory and final settlement of the administratrix.

Now, we respectfully submit that the fundamental error of the Court of Appeals of Kentucky on this point lies in its assumption that the County Court in Tennessee is a *Court of probate* merely, and that it is an *inferior* and *special* tribunal, without *general jurisdiction* in matters of *distribution* of the estates of deceased persons.

We concede that where, by statute, a County Court has jurisdiction to grant letters of administration on various grounds, *other than local domicile,*—as for example, where property is located, real or personal, where debtors reside, where the deceased died, and the like—the mere *grant of letters* will not operate as an *adjudication of domicile;* and we may also concede, without at all impairing the force of our contention, that the adjudication of domicile in a *grant of administration,* when *not necessary to the validity of the grant,* will not be conclusive of domicile in another State. This is the extent of the deci-

sions of this Court in *Thorman* v. *Frame*, 176 U. S., 350, and *Overby* v. *Gordon*, 177 U. S., 214.

But most obviously the question is a different one where there is an *actual adjudication of domicile* which is *necessary* to the exercise of *expressly granted jurisdiction to make distribution* of an estate. The distinction here adverted to is well drawn by Lord Blackburn and Lord Chancellor Herschell, in their opinions in *De Mora* v. *Concha*, 29 Chan. Div., 268, 11 App. Cas., 541-72, a case cited by Chief Justice Fuller in *Thorman* v. *Frame, supra*, and we may as well digress now to develop this point.

De Mora v. Concha.

This case, in the House of Lords, is fully reported under the style of *Concha* v. *Concha*, in Vol. 11 of English Ruling Cases, by Campbell —American notes by Irving Browne—pages 22, *et seq.*, from which we take the facts and extracts quoted.

In view of the fact that Juan Jose Concha, a wealthy *native of Chili*, died *in France*, after having made a will and codicil *in London*, naming Jose Maria De Mora and Theodore Manniquin, executors, and Trinidad Concha residuary legatee, and a live, fighting daughter, Adelinda

Concha, it is not surprising to find that there was much litigation, in many forms, and in many different actions over the estate, covering a period of more than twenty-five years. This particular case of *Concha* v. *Concha,* in the House of Lords, was an appeal in two such cases, *De Mora* v. *Concha* and *Concha* v. *Manniquin,* and hence the change in the style of the case on appeal.

The case was very thoroughly considered, opinions being delivered by the Lord Chancellor Herschell, and Lords Blackburn, Bramwell, Fitzgerald, and Ashbourne.

We shall not attempt any lengthy statement of the facts, but only such of them as are necessary to demonstrate the point that the decision strongly supports and fortifies our contention. We take them from the report of the case (11 Eng. Rul. Cas., pp. 23, *et seq.*), but for brevity state them in substance rather than quote long extracts.

Juan Jose Concha, a native of Chili, died in France in 1860, having made his will and codicil in London, by which he appointed De Mora and Manniquin executors, and made Trinidad Concha residuary legatee. A caveat having been issued by the testator's daughter, Adelinda Concha, the executors

propounded the will for probate, in the Probate Court, alleging that the testator, though a native of Chili, was domiciled in England at the time of his death. The daughter, Adelinda, pleaded that her father was a domiciled subject of Chili at the date of his will and of his death; that the will and codicil *were not executed with the forms and requisites of the law of Chili;* that he *had not complied with the rules and restrictions imposed upon testamentary disposition by the law of Chili;* and that, therefore, the will and codicil had not been *duly executed,* but if executed they were *inoperative.* The executors denied these insistences of the daughter.

Sir Creswell Creswell, as *Probate Judge,* heard the application, and on July 28, 1860, decided for the executors and the will was probated and the executors qualified—the Probate Judge deciding, among other things, that the testator's *domicile was in England.* This was the original case of *De Mora* v. *Concha.*

Later, the daughter, Adelinda Concha, filed her bill in equity, against the executors, in which she re-asserted that her father was a domiciled Chilian, and that his will and codicil undertaking to dispose of his estate contrary to the laws of Chili were void; and the executors contended that she was bound by the decision of the Probate

Judge, and could not relitigate that question. This was the original case of *Concha* v. *Manniquin.*

This brief statement of the facts, with one other which should be borne in mind, suffices to make clear the decision and the short extracts we shall make from some of the opinions. The other fact is this: That at the time of the proceeding before the Probate Court, it *had no power or jurisdiction to deal with the settlement and distribution of estates,* its powers in that regard being limited to the *probate of wills* and the *granting of letters* testamentary and of administration.

The opinion of the Lord Chancellor is devoted chiefly to the discussion of the two questions adverted to in *Thorman* v. *Frame,* 176 U. S., namely, (1) that the *bare appointment* of an executor or administrator does not foreclose inquiry as to the domicile of the deceased, and (2) that the determination by a Probate Court of a question *not necessary* to its decision is not conclusive; and it refers only briefly and incidentally to the *reduced powers* of the Probate Court at the time of this decision (1860) from what had been those of the prior *Spiritual Courts* in matters of administration. So we pass, for the present, to the opinion of Lord Blackburn, who goes

directly to this point, and shall recur to the Lord Chancellor's opinion on the same point later.

Said Lord Blackburn (pp. 35-6)—italics ours:

> "As to the first of these appeals, the appeal on the supposed ground that it was settled by the decision of Sir Creswell Creswell —either because it was a judgment *in rem,* or because it was a judgment *inter partes,* and the parties were the same—that the domicile of Don Juan Jose Concha at the time of his death was in England, it, I think, is a mistaken notion that it was so settled, and that it was a judgment *in rem.* Upon that point I attach *a good deal of weight,* as simplifying the question, to the fact that by the *Probate Act of* 1857 *the authority and power and jurisdiction* in England of the *Judge of the Court of Probate,* which Sir Creswell Creswell was at that time, were by the 23rd section *very much cut down* and were different from that which had been the jurisdiction of the Spiritual Court before.
>
> "Speaking from memory (unfortunately I have not the section before me), he is to have the same jurisdiction as the Prerogative Court, but there is an express *proviso* that he is *not to have jurisdiction over suits for distribution.*
>
> "This is taken away from him, or rather is not given to him, although it had belonged to the Spiritual Court before.

"Now, that, I think, makes a very considerable difference, when you look at it, as to what ought to be the effect of the judgment of Sir Creswell Creswell, the Judge of the Probate Court, as being a judgment *in rem* in the sense in which it decides matters conclusively.

"That, in my mind, takes away the applicability of the case of *Bouchier* v. *Taylor,* 4 Bro. P. C., 708, because Sir C. Creswell, when deciding, as Judge of Probate, that probate should be granted to the executors of this will, *had not to decide,* and not only had not to decide, but *could not then or at any other time decide,* what was the construction of that will, or what was its *effect for the purpose of giving to legatees, or not giving to legatees.* What he did decide was (and to that extent I think the decision was conclusive on everybody) that there was *an executor entitled to have probate in England* for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made the executor *a good executor according to the law of England;* but I do not think that Sir Creswell Creswell *had any power* to say that the testator was or was not really a domiciled Englishman."

Lord Blackburn also refers (p. 39) to the case of *Bouchier* v. *Taylor,* 4 Bro. P. C., as correctly deciding that a decision by the old Spiritual

Court on the domicile of a decedent was conclusive, because that Court *had jurisdiction of the distribution of estates,* as well as of the probate of wills and the appointment of executors and administrators, and he adds:

> "But that can have no application here, where the Judge of the Court of Probate *had no jurisdiction to decide what was to be done with the residuary sum of the testator's property* after all creditors who had a right to come upon it had been sufficiently paid off. *He had no jurisdiction to decide that*—that would be done by the Court of Chancery now—*it could not be done by the Court of Probate.* That being so, I think it is quite clear that this is not a decision *in rem* which would bind anyone."

Recurring now briefly to the opinion of Lord Chancellor Herschell, we will not burden this brief with quotations bearing on the two points before alluded to and so well covered by the case in 176 U. S., but limit ourselves to an extract relative to the point elaborated by Lord Blackburn.

Said the Lord Chancellor (pp. 34-5)—italics ours:

> "In the next place, it must be remembered that at that time" (when *Bouchier* v. *Taylor* was decided) "the Spiritual Court was a *Court of distribution* as well as a Court

merely to determine the validity of the testament, and to grant probate or administration; it was a *Court of distribution concurrently with the Court of Chancery.*

"It was said there by the noble and learned Lords in this House that the decision of a Spiritual Court would determine that question *for all purposes with which it had to deal;* it would determine it not merely for the purpose of saying to whom administration should go, but it would also determine it for any subsequent question which would arise in the same cause with regard to the *distribution of the estate.* That finding would be a finding of the Spiritual Court for both purposes; so that it was impossible to hold that the Court of Chancery, being merely a Court of *concurrent jurisdiction for the purpose of distribution,* would not be bound by the finding of the Spiritual Court *in a matter of distribution,* a finding between the same parties on the very point which in each case *had to be determined.*"

We digress to say that the relations subsisting between the old Spiritual Court and the Court of Chancery of England at the time of the decision in *Bouchier* v. *Taylor,* was precisely the same as now exists between the County Court and the Chancery Court of Tennessee; and the *jurisdiction* in probate and administration matters,

of these two English Courts was then precisely as is now that of the County and Chancery Courts, respectively, of Tennessee, as is fully shown by the statutes and decisions cited later on in this brief. The jurisdiction of the County Court of Tennessee, as a Court of *distribution*, is as full and ample as was ever that of the Spiritual Court of England, on that subject; and it is *original*, too, as was that of the old Spiritual Court of England, and that of the Chancery Court, as a Court of *distribution*, is likewise only *concurrent*, as was that of the English Court of Chancery. And it is just as illogical to say that the County Court of Tennessee, with jurisdiction to *distribute estates*, cannot determine *domicile* and thereby *ascertain the distributees*, as it was illogical to say the same thing of the old Spiritual Court of England.

This case of *Bouchier* v. *Taylor*, and the case of *De Mora* v. *Concha*, so much exploited by our adversaries in their briefs below, are direct authority, in principle, that the decision of the County Court of Hardin County, Tennessee, that Charles Baker was *domiciled in Tennessee* at his death, was within its jurisdiction and binding and conclusive as a decision *in rem*, as we argued below. And these cases also put at rest the illogical (not to say absurd) contention of

adversary counsel, permeating their entire brief below, that the *local domicile* of a decedent, at the place where the Court is sitting, is the *indispensable jurisdictional fact which alone can enable the Court to decide the question of domicile* —for that is what their whole argument, even here, comes to in its last analysis.

Before passing finally from these English cases, we wish to call attention to the American notes to *Concha* v. *Concha* in the publication from which we have quoted, and especially to the opinion of Mr. Justice Story in *Thompkins* v. *Thompkins*, 1 Story, 547 (Cir. Ct.), there quoted:

> "The sentence or decree of the proper ecclesiastical Court, as to the *personal estate,* is not only evidence, but is conclusive as to the validity or invalidity of the will; so that the same question cannot be re-examined or litigated in any other tribunal. *The reason is,* that it being the sentence or decree of a Court of *competent jurisdiction,* directly upon the *subject-matter in controversy,* to which all persons who have any interest are, or *may make themselves,* parties for the purpose of contesting the validity of the will, it necessarily follows that it is conclusive between those parties. For *otherwise there might be conflicting sentences or adjudications upon the same subject-matter between*

the same parties, and thus the subject-matter be delivered over to *interminable doubts,* and the *general rules of law,* as to the effect of *res judicata, be completely overthrown.*

In short, such sentences are treated as of a like nature as sentences or proceedings *in rem,* necessarily conclusive upon the matter in controversy, *for the common repose and safety of mankind."* (p. 46, 11 Eng. Rul. Cases.)

It remains only to confirm what we have said as to the jurisdiction of the County Court, in Tennessee, in matters of distribution.

The statutes and judicial decisions of Tennessee as contained in Shannon's Code and the published reports, are stipulated into the record—the stipulation appearing on page 232 of the transcript, but not embraced in the printed record; and it is only necessary to refer to them.

Statutes of Tennessee on Jurisdiction of County Court in Matters of Administration and Distribution.

Section 6027, Shannon's Code, with such subsections as are pertinent, reads as follows:

"6027. *Original Jurisdiction.* — The County Court has original jurisdiction in the following cases:

(1) *Wills.*—The probate of wills.

(2) *Letters.*—The granting of letters testamentary and of administration, and the repeal and revocation thereof.

(3) *Administration.*—All controversies in relation to the right of executorship or of administration.

(4) *Accounts.*—The settlement of accounts of executors or administrators.

(5) *Partition and Distribution.*—The partition and distribution of the estates of decedents; and for these purposes the power to sell the real and personal property belonging to such estates, if necessary to make the partition and distribution, or if manifestly for the interest of the parties."

There are numerous other subjects over which the jurisdiction is original and general, mentioned in other subsections.

The next succeeding sections are as follows:

"6028. The County Court shall have concurrent jurisdiction with the Chancery and Circuit Courts to sell real estate of decedents for distribution or partition. The mode of procedure in such cases in the County Court, shall conform in every respect to the rules and regulations laid down for the conduct of similar causes in the Chancery and Circuit Courts."

"6029. And in such counties as have a County Judge, he shall have the powers above enumerated."

"6030. Such Courts are expressly vested, over all subjects enumerated in the foregoing sections, with all the power and authority necessary and proper to the exercise of the jurisdiction therein conferred."

Sections 4031 to 4046 relate to settlements of administrators and executors and to appeals in matters of dispute over such settlements.

Under the title, "*Distribution of Estates*", are the following sections:

"4047. No executor or administrator shall take, hold, or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements, and such debts as he shall legally pay within two years after administration granted; but all such estate so remaining shall, immediately after the expiration of two years, be divided and paid over to the person or persons to whom the same may be due by law or by the will of the deceased."

"4048. Any distributee or legatee of the estate may, after the expiration of two years from the grant of letters, apply to the County, Circuit, or Chancery Court of the county or district in which administration was

taken out, to compel the payment of his distributive share or legacy."

"4049. The application shall be by bill or petition; shall set forth the claim of the applicant as legatee or distributee; shall allege that the assets of the estate are more than sufficient to pay the debts, charges and other claims, if any, entitled to priority, and be verified by affidavit."

"4050. The proceedings, under such applications, shall be conducted as other equitable actions, and heard and determined summarily as soon as practicable."

The immediately succeeding sections are, in substance, (4051) to punish personal representatives for the conversion of trust funds; (4052) declaring how hiership of persons claiming interests may be established; (4053) requiring refunding bonds for the protection of creditors; (4054) filing and recording refunding bonds; (4055) providing for *scire facias* against obligors in such bonds; (4056) for judgments and executions in such cases; (4057) requiring receipts from legatees and distributees for their shares when paid; and (4058) requiring the recording in full of such receipts.

Sections 6107 to 6114, under the title "Concurrent Jurisdiction", prescribe the subjects of

which the Chancery Court has concurrent jurisdiction with the County or Circuit Courts, or with both. In substance, these provisions, as they affect the County Court are: that the Chancery and County Courts shall have concurrent jurisdiction over the persons and estates of persons of unsound mind and infants, and of the appointment of administrators in certain cases (not important to note in detail), and that the Chancery, Circuit and County Courts shall have concurrent jurisdiction of divorce, dower, and the sale, partition and distribution of the estates of decedents, infants, and tenants in common—the section on dower and sales for partition and distribution being as follows:

> "6112. It (the Chancery Court) has jurisdiction, concurrent with the Circuit and County Courts, of proceedings for the partition or sale of estates by personal representatives, guardians, heirs, or tenants in common; for the sale of land at the instance of creditors of the decedent, if the personal property is insufficient to satisfy the debts of the estate; and for the allotment of dower."

Other sections declare the right to administer as being, (1) in the widow; (2) the next of kin; and (3) the largest creditor appearing and proving his claim (section 3939); the place of admin-

istration upon the estate of a resident decedent to be, the county where he had his usual residence, and if he had a fixed place of residence in more than one county, then in any such county (section 3934); and the county in which and the conditions under which letters may be granted upon the estates of non-residents to be, (1) where the deceased had any estate, real or personal, at the time letters are applied for; (2) where any debtor of deceased resides; (3) where any debtor of a debtor of the deceased resides, his debt being unpaid when application is made; and (4) where any suit is to be brought, prosecuted or defended, in which the estate is interested (section 3935).

Decisions of Tennessee on Jurisdiction of County Court in Matters of Administration and Distribution.

While the County Court in Tennessee has not general common law jurisdiction over all subjects, but has cognizance only of certain subjects specified in the statutes of the State, it has, nevertheless, over those subjects, a general and superior jurisdiction which entitles its judgments and decrees, pronounced within its field, to the benefit of all the presumptions, and to all the force and effect, which appertain to the judgments and decrees of Courts of general common law jurisdiction.

This has been the uniform holding of the Supreme Court of the State for a long period of time.

As early as 1845, in the case of *Brien* v. *Hart,* 6 Hum., 130, 133, this question was thoroughly considered and the Court, speaking of the County Courts, said:

> "Our Courts of Probate are not inferior, in the technical sense of that term, as used upon this subject at common law, nor is this jurisdiction special and limited; on the contrary, it is *general, original* and *exclusive.* In the exercise of *such a jurisdiction* these Courts are entitled to the presumption that what they do is *rightly* done and on *just grounds.*"
>
> (The italics in this and other quotations in this brief are ours.)

And after quoting from *Peacock* v. *Bell,* 1 Saund., 74, the noted rule of jurisdiction that "nothing shall be intended to be out of the jurisdiction of a superior court but that which appears expressly to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged", the learned Court, in *Brien* v. *Hart,* added:

> "Our Courts of Probate fall under the first category in this rule set forth."

In a still earlier case, decided in 1840, *Wilson* v. *Frazier,* 2 Humph., 30, it was for the same reason held that administration could not be collaterally attacked because granted to the wrong person.

In *Railway* v. *Mahoney,* 5 Pick. (89 Tenn.), 311, decided in 1890, it was held that administration could not be collaterally attacked because the intestate, though a resident of the State, was not a resident of the county. And the Court in that case laid down what has been the settled law of Tennessee for three-quarters of a century, in the following language:

> "It has long been settled in this State that as to matters of administration the County Court is a Court of general jurisdiction.
>
> "In consequence it follows—first, that its judgment, exercised in the appointment of an administrator, need not recite the facts upon which it was made; and, second, that, being authorized *to determine for itself the existence of the facts* which authorize it to appoint an administrator on the estate of an intestate resident of Tennessee, its determination of such facts is *conclusive* in any collateral attack in another Court.
>
> "Of course, the rule could not extend to a case where *no appointment could be legally made by any Court;* as on the estate of a living man. 4 Lea, 251."

Numerous other cases, from 1840 down to the present time, have declared and upheld this rule as to the nature of the jurisdiction of the County Court in matters of administration, and the effect of its judgments and findings therein. The case in 4 Lea, 251, cited in the above extract, is an illuminating one on this rule and the reasons for it. That was the case of *D'Arusement* v. *Jones,* decided in 1880, and it deserves more than passing notice. It was the first case in Tennessee holding a grant of administration void upon collateral attack.

Administration had been granted upon the estate of Mrs. D'Arusement by the County Court of Shelby County, on petition and proof, satisfactory to the Court, that she had been absent from her home and unheard of by her friends and acquaintances for a period of more than seven years and was believed to be dead. The Court found as a fact that she was dead. The administrator, thus appointed, proceeded to foreclose a mortgage upon real estate securing notes for a considerable sum due the estate as shown by the public records, sold the land and disposed of the proceeds. Some years afterwards, Mrs. D'Arusement appeared and instituted proceedings against the purchasers of the mortgaged property for the sale of the same

lands in foreclosure, for the payment of the notes to her, which she produced. The defense was, that although the administration was *improperly* granted, and would, on application to the County Court, be recalled and revoked, yet it was not *void;* and consequently that the purchasers at the administrator's sale acquired title and Mrs. D'Arusement must look to the proceeds. But this defense was overruled, on the ground that Mrs. D'Arusement being a *living* person, there was no power in any Court to appoint an administrator upon her estate.

The question was a novel one in the State, was ably argued by some of its best lawyers, and was decided by a divided Court. It was again fully reconsidered on an application for rehearing. The question was also the subject of an able article, published about the same time, in the *American Law Review,* of May, 1880.

The majority opinion, which has since been adhered to and accepted as the law of the State, was delivered by Mr. Justice McFarland. Its reasoning is irresistible, viewing the question from the standpoint of the Tennessee statutes, and we shall ask indulgence to quote from it before passing from the County Court proceeding in the present case.

Now, as we have said, there is no doubt whatever that so far as the *granting of administration* is concerned, the County Court, under the Tennessee system, is a Court of *superior* and *general jurisdiction*, and its proceedings and decrees entitled to the full faith and credit due to the proceedings and decrees of other Courts of that dignity and class; and from which it follows that appellant's appointment as administratrix of her husband by the County Court of Hardin County, Tennessee, was valid and unimpeachable, collaterally, in that State; and that, under the equal faith and credit Act of Congress, it is unimpeachable in Kentucky.

But we contend, further, that the same jurisdiction of the County Court which protects against collateral attack its *appointment* of an administrator, extends to and similarly protects its *judgment and determination of the place of domicile* of the decedent; and while, so far as we can ascertain, this specific question has not been adjudged in Tennessee, we think it necessarily follows from the Tennessee statutes and decisions on the subject of administration, to which we have referred.

It is perfectly obvious that the *domicile* of the decedent within the State is *not an essential jurisdictional fact*, like that of the *death;* for the

jurisdiction arises and the Court may proceed, if the statutory requisites be shown, *wherever the domicile may have been.* But in all cases, the County Court to which application is made must determine, in the first instance, the place of residence of the deceased; for if a resident of the State, administration can be granted only in the county where he resided, whether any of his property be there or not; and it is only where he is a non-resident that administration can be granted under section 3935 above noted.

And in all cases the County Court must determine, in the second place, *how the estate is to be distributed,* for otherwise it could not *make distribution* as the statute empowers it to do; and in order to do this, it must determine the *domicile of the deceased;* and if there be a *foreign* will, section 3916 of Shannon's Code provides that a duly certified copy of it, after it has been probated in another State, may be filed and recorded in the County Court of the county, in this State, where the property disposed of by it is situated, and that such will shall thereupon have the same force and effect as if it "had been executed in this State, and proved and allowed in the Courts of this State".

The County Court determines all these questions just as other Courts determine the various

questions arising before them in the course of their exercise of their jurisdiction when once acquired. They are not *essentials* of the jurisdiction, in any proper sense, but are things done and questions determined in the course of the *exercise of jurisdiction,* resting upon the *fact of death* of the owner of the estate, and the *law of the State* conferring the jurisdiction *in such cases* upon the County Court.

Theoretically, therefore, under the statutes and decisions of Tennessee, whatever may be the decisions of other Courts under other statutes, the finding and judgment of the County Court as to the *place of domicile* of a decedent upon whose estate it grants administration, is within its *jurisdiction,* and not subject to collateral attack by a mere averment that such finding is not true.

Not only is this the theory of the Tennessee statutes and decisions we have referred to: it is the logical and *necessary consequence* of these statutes and such cases as *Railway* v. *Mahoney, Brien* v. *Hart* and *D'Arusement* v. *Jones.* The last named case is not only consistent with this view, but we think necessarily involves it and rests upon it, and so we now recur to it for a moment.

The controlling consideration with the Court was, that the Tennessee statutes did not contemplate or authorize administration upon the estates of persons *putatively* or *presumptively* dead, but only on the estates of *deceased persons;* and, therefore, the Court held, the *death* was the *basic fact, essential to the power of the Court to act at all*—the fact without which the County Court would have *no jurisdiction* either to *grant administration* or to *determine any question* with respect to the estate of such person. The *fact of death,* in other words, was held to be the *underlying jurisdictional fact* upon which depended the power of the Court to act in any way, under its administration or probate jurisdiction, which was conceded to be *superior* and *general.* The Court recognized the proposition that *such a jurisdictional fact* may always be inquired into, whatever the dignity of the Court, and we think that proposition a sound one; but this does not mean, of course, that the *record of procedure, and the findings thereon,* can always be *contradicted* collaterally and by extraneous evidence.

On the rehearing of this Tennessee case, it was urged by counsel—and the article in the *American Law Journal* gave some countenance to the view—"that the jurisdiction does not depend

upon the *fact* of death, but upon the *allegation of the fact* in the application for letters of administration"; but the Court rejected this contention and adhered to its original opinion wherein it said, among other things, on this subject:

> "They (our statutes) simply authorize administration upon the estates of *deceased persons,* and if the person be not dead, the Court would be acting *ultra vires* to appoint an administrator. But it is said the Probate Court has jurisdiction to ascertain the fact of death, and its judgment finding that fact is conclusive until revoked or reversed. The general principle is, that the jurisdiction being conceded, the judgment is conclusive of all matters involved, but if the jurisdiction be disproven, then the judgment is void for all purposes. If it be conceded that the jurisdiction rests upon the existence of a particular fact, then it will not do to say that the finding of that fact by the Court is conclusive of its own jurisdiction, for this would be, to use a common expression, 'reasoning in a circle'. The judgment is conclusive, if the Court has jurisdiction, and its judgment that it had jurisdiction is conclusive of the jurisdiction. There may be, in some cases, confusion as to what constitutes the jurisdictional facts, but this would seem to be about as clear an illustration of it as could be found: That a Probate Court has assumed that a certain person is dead, and has

granted administration upon his estate, when in fact he was not dead.

. . . . . .

"The proper distinction is illustrated in the case of *Allen* v. *Dundas,* 3 Term Rep., 125, where it was held that payment to one named as executor in a forged will, which had been presented and allowed in the prerogative Court, was a protection against the demand of one who had procured the proceedings on the forged will to be set aside and himself appointed administrator, *this* upon the ground that *the person being dead,* the Court had jurisdiction. But the Judges said that if the person *were not in fact dead,* the whole proceeding would be void. So that the jurisdiction rests upon the *fact of death,* and this being clearly shown untrue, it must result that the entire proceeding was without jurisdiction and void. For at least it sounds almost absurd to say that any man is to be bound by the judgment of a Probate Court that he is dead. The argument that the Court has jurisdiction to ascertain the fact of death is fallacious, for this must assume that the Court may decide the question either way, and if it concludes that the person is not dead, then it has no jurisdiction *for any purpose.* While the Court may hear evidence of the death, the fact is generally *assumed,* and if the Court undertake to put its finding of the fact in the form of a judgment, it gives it no greater validity. This

conclusion is sustained by the great weight of authority."

It will be noticed that in the statutes we have referred to the words "residence" and "fixed residence" are used in the sense of *domicile,* though the word "domicile" is nowhere used; and that the findings of the County Court on the question whether a decedent was "resident", or domiciled, in a particular county at the date of his death, is held to be conclusive against collateral attack. The question whether a man is resident or domiciled in one county or another *in the same State,* is one and the same in principle with the question whether he is resident or domiciled at one or the other of two places *in different States.* The holding that the County Court *has* jurisdiction to determine the former question, we submit is in effect a holding that it has jurisdiction to determine the latter; and if it *has the jurisdiction,* then its decision is immune from *collateral* attack in any *other* Court in Tennessee, and being so there, under the rule of comity, it is equally so in Kentucky.

Concluding on this branch of the argument, we wish to say we have not overlooked the numerous cases in other Courts, including the Supreme Court of the United States, holding the Probate Courts of other States to be *inferior*

Courts of *special* and *limited* jurisdiction, and giving to their orders and judgments only the limited effect ordinarily due to the action of such tribunals. Our answer to all such cases, as authority here, is two-fold: First, they are based on statutory systems, *materially different* from that of Tennessee; and, second, the *judicial construction* of these Tennessee statutes by the Courts of Tennessee is binding both in Tennessee and elsewhere. Whatever may be the theoretical views of other Courts as to what the jurisdiction of County or Probate Courts *ought to be,* or *may be* under *other statutes,* it is enough for our purpose that that jurisdiction and the *faith and credit* to be given to its exercise, *in Tennessee,* are such as we have stated them to be. This is the essence of the law of comity between the States of this Union. These proceedings must have the *same faith and credit in Kentucky* that they are *entitled to in Tennessee.*

We believe we have confirmed the statements we made in connection with the English cases of *De Mora* v. *Concha* and *Bouchier* v. *Taylor,* concerning the jurisdiction of the County and Chancery Courts of Tennessee as compared with that of the Spiritual and Chancery Courts of England at the time of the decision of the latter case; and we leave this branch of the argument with

the belief that a reversal of the decision of the Kentucky Court of Appeals might be rested, were it necessary, upon its refusal to give force and effect to the Tennessee *County* Court judgment as to the domicile of Charles Baker.

FULL FORCE AND EFFECT GIVEN IN TENNESSEE TO JUDGMENTS AND DECREES OF CHANCERY COURT BASED ON CONSTRUCTIVE SERVICE.

This proposition was not elaborated in our principal brief, but was there treated as conceded by adversaries and by the Kentucky Court of Appeals, as it really was. Out of abundant caution we now cite the pertinent statutes and decisions on the subject.

That the proceeding in the Tennessee Chancery Court resulting in the judgment or decree now relied on was in all respects regular and in accordance with the statutes and rules of practice in that State, has not, at any stage of this case, been questioned by adversaries; and the regularity of that proceeding, and, indeed, its conclusive force and effect, *in Tennessee,* are fully recognized in the opinion of the Kentucky Court of Appeals. The same is true of the authentication of the record of that proceeding—its regularity has not been at any time questioned. This ought

to, and perhaps does, relieve us of the necessity of supporting by citations any of the propositions so conceded; but for the information of the Court (should it desire such information), we submit a brief review of the statutes and decisions of the State on constructive service and the force and effect—the conclusive character—of judgments and decrees based on such service in cases wherein such service is authorized in lieu of personal service.

Statutes on Jurisdiction of Chancery Court and on Constructive Service.

In attachment cases the levy of the attachment and publication, in the manner prescribed, are in lieu of personal service, and authorize the Court to proceed to determine the debt and subject the property attached. Shan. Code, 5279-5284. Such proceedings are governed, in Tennessee, by sections of the Code applicable alone to attachments. Shan. Code, sections 5211 to 5298, not pertinent here.

The proceedings here under consideration are governed by Chapter 3, of Title 9, of Part 3, of the Code. Part 3 comprehends "The Redress of Civil Injuries"; of which Title 9 is, "Of the Chancery Court"; and Chapter 3 of said title is, "Of the Practice of the Chancery Court".

Chapter 1 of Title 9, is, "Of the Jurisdiction of the Chancery Court," and begins with Article 1, on "Exclusive Jurisdiction", the first section of which (being section 6088 of the Code) is:

> "The Chancery Court shall continue to have all the powers, privileges and jurisdiction properly and rightfully incident to a Court of equity by existing laws"—

construed to mean "by the statute and common law of the State." 13 Lea, 30.

Then comes Article 2 of this title, on "Concurrent Jurisdiction," the third section of which (being section 6109 of the Code) is:

> "It shall have and exercise concurrent jurisdiction with the Circuit Court of *all civil causes of action,* triable in the Circuit Court, except for injuries to person, property or character, involving unliquidated damages."

And another section (already quoted), 6112, gives it concurrent jurisdiction with the Circuit and County Courts—

> . . . of proceedings for the partition or sale of estates by personal representatives, guardians, heirs, or tenants in common, . . . and for the allotment of dower."

And next, Article 3, on "Personal and Local Jurisdiction," a section under which (being section 6121 of the Code) provides:

> "The local jurisdiction of the Court of Chancery shall be subject to the following rules:
>
> "(1) The bill may be filed in the chancery district in which the defendant or a material defendant resides, etc.
>
> "(2) (Bills in regard to titles of lands.)
>
> "(3) (Bills enjoining executions.)
>
> "(4) Bills against *non-residents,* or persons whose names or residences are unknown, may be filed in the district in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which the *subject of the suit, or any material part of it, is.*"

Chapter 2, of Title 9, is, "Of the Pleadings in the Chancery Court," which we pass over as not important to notice here.

Chapter 3, of Title 9, entitled, as we have said, "Of the Practice of the Chancery Court," contains 14 "Articles," the third of which is entitled "Proceedings when Personal Service is Dispensed With"; and under it are the following Code sections:

"6162. Personal service of process on the defendant in the Court of Chancery is dispensed with in the following cases:

"(1) When the defendant is a non-resident of the State.

"(2) When, upon inquiry at his usual place of abode, he cannot be found, so as to be served with process, and there is just ground to believe that he has gone beyond the limits of the State.

"(3) When the sheriff shall make return on any leading process, that he is not to be found.

"(4) When the name of the defendant is unknown and cannot be ascertained upon diligent inquiry.

"(5) When the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry.

"(6) When judicial and other attachments will lie, under the provisions of this Code, against the property of the defendant."

6163: Requires the facts to be stated under oath in the bill, or by separate affidavit, or to appear by the return of the sheriff;

6164: That a rule or order shall be entered by the Clerk, upon the necessary oath or affidavit being made, requiring the defendant to appear

at a rule day to be named in the order, and make defense;

6165: That this order shall be published for four consecutive weeks in the newspaper mentioned in the order, or designated by the general rules of the Court;

6166: Provides that this order for publication may be made at any time after the bill is filed;

6167: Prescribes what the order of publication shall contain;

6168: Prescribes additional contents of the order when the defendant is *unknown;* and,

6169: Provides that the fact of publication may be proved by the affidavit of the printer, or actual production of the newspaper in Court.

By section 6179, under Article 5 of the same chapter, entitled "Proceedings in Default of Answer," it is provided that—

> "The bill may be taken for confessed in the following cases:
>
> . . . . . .
>
> "(2) When an order for his appearance having been duly made and published as above prescribed, the defendant fails to cause his appearance to be thereupon en-

tered, and to plead, answer, or demur, or obtain time to answer."

And section 6181, in the same article, provides that—

> "Whenever an order *pro confesso* is lawfully had, the allegations in the bill are to be taken as admitted, *except* in the case of infant defendants, persons of unsound mind, executors or administrators, bills for divorce, and bills without attachment of property against *non-residents* and persons whose names or residences are unknown."

The next section, 6182, provides that infants and persons of unsound mind must appear by guardian or committee before the complainant can proceed; and the next, 6183, is as follows:

> "In the other excepted cases, the complainant may proceed as if the allegations of the bill had been put in issue by answer not sworn to, with the right to set for hearing forthwith."

Other sections provide for taking proof in such cases (6184), for defense at any time before final decree, as of course (6185-6), and for opening the decree and making defense by defendant or his representatives, on merits shown, within three years from date of decree, or within six months after notice by service of a copy of

the decree (6189-91); while section 4887, under Article 7, of Chapter 14, of Title 1, of Part 3, of the Code, allows an appeal in all cases.

We cite these statutes thus fully in order to confirm what we have said of the jurisdiction of the Chancery Court in Tennessee, and in order that the Court may have a fuller view of the system of Tennessee procedure in that vast number of causes which must arise in every State, wherein all the parties interested in property within the State cannot be reached by personal service of process. Some such judicial machinery exists, we dare say, in every State; and without it the administration of justice, in very many and very important cases, would be impossible.

Now, these are the statutes (with the rules of law applicable to them) which govern in the present case, and *not* those relating to *attachments for debt* and the decisions upon them.

Generally, on Cases Based on Constructive Service.

Cases coming under these statutes involve three essential elements: (1) a *subject matter,* in the form of property, which, or *some material part of which,* is *physically within* the jurisdiction of the Court whose action is invoked; (2) *joint or conflicting claims upon or interests in*

that subject-matter, by persons residing or domiciled *in different territorial jurisdictions;* and (3) *absence* from the territorial jurisdiction of the Court proceeded in, of one or more of such claimants.

Obviously this subject-matter may be *any kind of property.* It may be lands, or chattels, or mere choses in action, for all these are property. And, of course, it may be the *estate* of a deceased person, consisting of all these classes of property.

The subject matter of the case in the Chancery Court of Hardin County, in question here, was the *estate* of Charles Baker, deceased. A substantial part of that *estate* was physically located in Hardin County, Tennessee. All his *lands* were there. *Debts* due him, in a large sum, were there—the debtors lived there. He had *moneys* there. We pass by for the present the *corporate stock,* for while the certificates were physically there, the corporation being in Kentucky, the authorities are not in agreement as to the legal *situs* of the stock; although we think the sounder view is that the legal *situs* of corporate stocks, for the purpose of *intestate succession,* is the domicile of the owner, and, as personal property, they are governed by the law of the deceased owner's last domicile (*Lowndes* v. *Cooch,* 87 Md., 478; 22 Am. & Eng. Enc. Law, (2d Ed.),

1356; 18 Cyc., 1231, and numerous cases there cited), but it is not at all material, in our view, where the actual *situs* was. It is enough that a *material part of the estate,* both real and personal, of Charles Baker, was in Hardin County, Tennessee. The real *subject-matter* of that suit was unquestionably the *estate* of Charles Baker, and a *material part of it*—in fact, all of it, except the stock and the debt against Baker, Eccles & Co.—was physically within the jurisdiction of the Hardin County Chancery Court; and, as we have seen, the lawful administration of that estate was there; and the administratrix was there, charged by law with the duty of distributing the personal estate in her hands; and as the lawful *domiciliary* administratrix, which she claimed and was adjudged to be, she was invested with the *title of all the personal estate* of her intestate *wherever situated,* including the corporate stocks whatever their legal *situs* (18 Cyc., 1228, 1231, and cases cited); and the widow was there, entitled, in her individual right, to dower in Charles Baker's lands, and claiming to be sole distributee of his personalty.

Then there were the *conflicting* rights and claims of the widow and the mother and brother of deceased, respecting his lands, and the *conflicting* claims of the widow and mother of the deceased, respecting his personal estate.

And, finally, there was the *absence* from the State, and from the territorial jurisdiction of the Court, of two of these claimants of this property.

Now, assuming that the mother and brother would not go to Tennessee and there join the widow in the settlement of these conflicts in the Courts of that State, and that the widow would not go to Kentucky and there join the mother and brother in their settlement in the Courts of that State, pray how, on our adversary's theory, could they *ever be settled?* Neither side could be compelled, by any process known to our laws, State or Federal, to go to the State of the other side and submit to its jurisdiction. If the Courts of Tennessee could not settle the controversy at the instance of the widow, and bind the mother and brother, how could the Courts of Kentucky settle it at the instance of the mother and brother, and bind the widow? What *more* power have the Courts of the one State than the Courts of the other in such a case? And if the Courts of neither State have the power to *decide* the matter and *make an end of it*, where does such power reside?

Is it possible that *no Court*, anywhere, can *finally settle* such a question, unless *all* the parties interested come voluntarily before it and

submit to its jurisdiction? If so, our jurisprudence is sadly out of joint and not at all creditable to the intelligence of the age.

The case is not nearly so complicated as many that may be easily imagined and many that we know must often arise in this country. It is no extravagance to suppose cases where, by reason of the location of property of a decedent in a half dozen or more States, the diversity of the laws of distribution existing in such States, and the residence of the claimants of the succession in as many States, a far more complicated situation would be presented, as illustrated in our principal brief—though differing not at all in the applicable legal principles.

In all such cases, the rights of all the claimants, as to the personal estate, are dependent upon a single question of *status*—the *domicile*, at his death, of the deceased owner. Of course, as to *lands*, it may be conceded that their succession is governed by the *lex loci rei;* but it is everywhere held that the succession of *moveables*—personal property—is governed by the *lex loci domicilii* of the owner. Nor is the question at all affected by the recognized right and power of each State to protect its own citizens *as creditors*, even as to *moveables* physically within its terri-

torial limits, by refusing to permit their removal until domestic creditors are paid; for it is only the *right of succession* that is involved in the cases we have supposed and in the present case, and that is always *subject to the claims of creditors.*

But while the *rights of the parties* are dependent upon the *domicile,* as it may be finally determined, domicile is neither the *subject-matter* of the suit nor the *essential jurisdictional fact;* it is only a *material* and *issuable fact,* which is concluded by the decision once made by a Court with jurisdiction of the subject-matter and parties, according to the law of the tribunal so deciding, even though it be a mere Probate Court. 2 Black on Judgments (2d Ed.), sections 635, 639, 643, 645, 646.

Proceedings of the character under discussion are really proceedings *quasi in rem,* and governed by the principles applicable to proceedings *in rem.* The *res,* in the present case, is what we have designated as its subject-matter—the *estate* of Charles Baker. A great many proceedings, involving *status* of persons and property, or the rights of parties with respect to property in the custody or jurisdiction of the Court, are so treated; as for examples, inquisitions of lunacy; orders of naturalization; proceedings for di-

vorce; questions of identity, legitimacy and pedigree; bankruptcy and insolvency; probates and contests of wills and other probate adjudications; judgments on taxes and assessments; condemnations of property for public use; establishments of roads and boundaries; foreclosures of liens; decrees for sale for partition or other lawful purposes; administration of estates; and numerous others, where no *personal judgment* is sought by one party against the other, but only the determination of *their rights* and *relations* with respect to some *status* or *thing* in controversy. 2 Black on Judgments (2d Ed.), Chapter 20, on Judgments *In Rem.*

So, in *Woodruff* v. *Taylor,* 2 Vt., 65, speaking of the probate of a will, the Court said:

> "The proceeding is in form and substance *upon the will itself.* No process is issued against any one, but all persons interested in determining the *state or condition* of the instrument are *constructively* notified, by a newspaper publication, to appear and contest the probate; and the judgment is, *not that this or that person shall pay a sum of money or do any particular act,* but that the instrument is, or is not, the will of the testator. It determines the *status of the subject-matter* of the proceeding. The judgment is upon the thing itself; and when the

> proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this State is concerned), just what the judgment declares it to be."

And so, Mr. Black declares (section 639), citing *Holmes* v. *Oregon, Etc., R. R.,* 9 Fed., 229, and *Appeal of Willetts,* 50 Conn., 330:

> "Where a State statute provides that administration of an intestate estate shall be granted by the County Court, when the intestate 'at or immediately before his death, was an inhabitant of the county', etc., the decision of that Court upon the question of inhabitancy, properly presented for its adjudication, is not open to examination in a subsequent proceeding in a Federal Court."

And to the same effect are many cases in Tennessee, some of which we have already cited. See *Williams* v. *Saunders,* 5 Cold., 60.

And such is the settled law of England, even as to *foreign* judgments in the proper sense, where the relations between the governments are mere matters of voluntary or conventional *comity,* without the sanction of a *constitutional* requirement of equal faith and credit, such as affects the relations to each other of the *sister*

States of the American Union. Says Mr. Black (section 823), of the case of *Daglioni* v. *Crispen,* L. R., 1 House of Lords, 301:

> "In a recent English case it appeared that, in a *foreign* Court, upon the death of a person domiciled in the country where that Court had jurisdiction, C. claimed to be the *natural son* of the decedent, and as such natural son to be entitled by the law of that country to *inherit* his father's property, and alleged that his father was *of a particular station in society* (which circumstance allowed of such a claim by his natural son), and that the father had died *domiciled in the country,* and had died *intestate;* and the *foreign Court* found all these allegations in his favor. It was held that the Probate Court in England *was bound by the judgment of the foreign Court,* and had, therefore, *rightly* admitted C. to be heard as *contradictor to a will,* set up in the latter country as having been made by the decedent disposing of his *personal* property there."

It is scarcely possible to conceive of a single case involving *more* different elements of *status* and peculiar *local rights,* going to the ultimate establishment of the ownership of the whole personal estate, than are to be found here: the *natural son status* of the claimant, the *social status* of the father, the resulting *right to inherit,* the

domicile of the father, and the *intestacy* of the father; and yet the decision of these questions in favor of the son by a *foreign Court,* with no pretense of *actual notice* to the legatees in England, was held, in effect, to conclusively establish the right of this natural son to the *whole personal estate* of his father, to the utter negation and nullification of his father's will in England.

TENNESSEE DECISIONS.

The validity of proceedings conducted under the statutes we have quoted, relating to non-residents, has often been before the Supreme Court of Tennessee. In one of the earlier cases, *Kilcrease* v. *Blythe,* 6 Humph., 378 (1845), the whole subject came under review and was ably argued by Hon. Archibald Wright, afterwards one of the Judges of the Supreme Court, and Hon. Neil S. Brown, afterwards Governor, upon a record of a former judgment under these statutes which was exceedingly informal and would, it was conceded, have been reversed on writ of error or appeal; but it was held immune from attack in a subsequent proceeding.

Briefly, the case was this: One Brown, it was alleged, had furnished Kilcrease with certain land warrants, to be entered and grants obtained

for the equal benefit of the two; Kilcrease entered the lands and obtained grants *in his own name,* and afterwards died; Brown filed his bill in the Chancery Court of the district in which the lands were located, against the heirs of Kilcrease, who were then non-residents, living in Mississippi, and alleged to be infants and of whom one Townsend, also made defendant, was "supposed to be guardian," praying to recover and have divested out of them and vested in himself one-half of these lands. After two returns of "not found" by the sheriff, and an affidavit by the complainant of the non-residence, an informal order was entered by the Clerk that publication be made in a certain "newspaper of the town of Nashville" for six successive weeks, but fixing no *time* for the appearance of defendants, and indicating no *purpose* for which they were to appear, and there was no newspaper or affidavit of publication found in the record; and at a subsequent term, an order *pro confesso* was taken, reciting that "it appeared to the satisfaction of the Court that publication has been made for the defendants according to the order heretofore made in this Court"; but no such *previous* order of the Court was shown, nor did there appear to have been any appointment of a guardian *ad litem.* There was final decree for complainant according to the prayer of the bill.

Subsequently, in an action of ejectment by the heirs of Kilcrease against Brown's vendee, this decree was relied on in defense, as a muniment of title. The plaintiff insisted it was void, but there was judgment for the defendant, and on appeal this was the only question. The judgment was affirmed, the Court holding that the suggested defects were mere *irregularities* not affecting the *jurisdiction,* and that the recital of the decree of the Chancery Court that it appeared *to its satisfaction* that publication had been made according to its previous order, could not be contradicted collaterally; that, being a superior Court of general jurisdiction, every reasonable presumption must be indulged in favor of its proceedings, and that, having jurisdiction of the subject matter and parties, its decree was conclusive against attack in another suit, however irregular and defective in form its proceedings may have been.

This case of *Kilcrease* v. *Blythe* has been ever since followed and many times cited and reaffirmed by the Supreme Court of Tennessee. It has been cited and followed in the following, among other cases:

Hopper v. *Fisher,* 2 Head, 253 (1858): Holding Chancery Court a *superior* Court, and that upon collateral attack of its decree it will be presumed that infants represented by guardian *ad*

litem were *properly before the Court by personal service of process or by proper notice.*

Gilchrist v. *Cannon,* 1 Cold., 581 (1860): Holding recital in decree of Chancery Court that publication was duly made as to heirs of non-resident decedent sufficient, unless it appear *from something in the record* that the fact was *positively otherwise.*

McGavock v. *Bell,* 3 Cold., 513 (1866): Holding that where Chancery Court, or other Court of general jurisdiction, has jurisdiction of subject matter and acquires jurisdiction of parties, its proceedings cannot be held to be void, and that in this respect it is not material whether the jurisdiction be inherent or statutory, provided the statute be of a *general* nature.

Townsend v. *Townsend,* 4 Cold., 70 (1867): Holding that probate of a will or grant of letters of administration, in the County Court cannot be attacked in the Chancery Court, even where the probate or grant was had more than *thirty years* after death of testator or intestate, where statute prohibited such grant after 20 years, except to distributees who were minors or *femes covert* at the death of the decedent, and to them not after 30 years; that the probate and grant having been *accomplished* will stand until set

aside under a proper proceeding in the granting Court.

Claybrooke v. *Wade,* 7 Cold., 555 (1870): Holding that recital in Chancery Court decree that notice had been duly given by publication is presumed true, and that "such presumptions are necessary to uphold the judicial tribunals of the country."

Walker v. *Cottrell,* 6 Baxt., 275 (1873): Holding recitals in orders and decrees of superior Courts that publication had been duly made sufficient, unless contradicted *by the record itself,* and they cannot be contradicted by extraneous evidence.

Howard v. *Jenkins,* 5 Lea, 175 (1880): Holding recital in order *pro confesso* that "publication has been regularly made" sufficient on either direct or collateral attack in absence of anything *in the record* showing recital untrue.

Allen v. *Gilliland,* 6 Lea, 521 (1880): Holding that all presumptions are made in favor of the judgments and decrees of superior Courts, and that orders to the effect that publication was made "according to law" are sufficient without statement of details.

Davis v. *Reaves,* 7 Lea, 585, 606 (1881): Holding it well settled in Tennessee that if the Court

have jurisdiction of the person and subject matter, its proceedings cannot, even at the instance of an infant, be held to be void as to third persons claiming under its judgment or decree, after the final disposition of the case, whether the jurisdiction be inherent or statutory, the statute being of a general nature.

Posey v. *Eaton,* 9 Lea, 500 (1882): Holding decree under which lands of decedent are sold cannot be subsequently attacked on averment that personalty had not been exhausted, or that the administrator filing the bill had not been legally appointed, or that the Judge or Chancellor trying the case was of kin or counsel to the parties, and therefore incompetent; and that nothing short of *want of jurisdiction* will avail.

Harris v. *McLanahan,* 11 Lea, 181 (1883): Holding that recitals in judgment or decree of superior Court are conclusive unless positively contradicted *by the record itself.*

Pope v. *Harrison,* 16 Lea, 81 (1885): Holding that "In a collateral attack upon the proceedings of a Court of general jurisdiction, it is not necessary that the jurisdictional facts should affirmatively appear upon the face of the record; it is sufficient if the record, with its legal intendments and presumptions, shows these facts."

Robertson v. *Winchester,* 1 Pick. (85 Tenn.), 171, (1886): Holding that decrees of superior Courts are valid on collateral attack, notwithstanding irregularities in the proceedings, if it appear in the record that the Court acquired jurisdiction of the person of the defendant and of the subject-matter; and that in such case "if the defendant is a non-resident, jurisdiction over his person is sufficiently shown by recitals in orders on the rule docket that publication was made, and in subsequent decree that the cause was heard on order *pro confesso;* or, in the absence of all other evidence, by the mere recital in the final decree that the cause was heard on order *pro confesso,* as it would be presumed such order was made on publication as required by law."

Franklin v. *Franklin,* 7 Pick. (9 Tenn.), 119, (1891): Holding and reaffirming that County Court is a Court of general jurisdiction as regards administration, and that its appointment of an administrator upon the estate of a decedent as an intestate, is not void on collateral attack, where deceased was not in fact an intestate and his will was subsequently discovered and probated.

Reinhardt v. *Nealis,* 17 Pick. (101 Tenn.), 169, (1898): Holding that judgment of superior Court of general jurisdiction cannot be im-

peached collaterally by the parties to it where a want of jurisdiction is not apparent *on the face of the record.*

Wilkins v. *McCorkle,* 4 Cates (112 Tenn.), 688, (1904): Holding, in reference to a decree against non-residents, the propositions embodied in the following head notes:

> "Upon a collateral attack upon a judgment or decree of a Court of general jurisdiction by parties or privies thereto, the rule is that such judgment or decree cannot be questioned except for want of authority over the matter adjudicated upon; and this want of authority must be found in the record itself."
>
> "In the absence of anything in the record, where the decree is collaterally attached, to impeach the right of the Court rendering such decree to determine the questions involved, there is a conclusive presumption that it had such right."
>
> "Whether the Court acquired jurisdiction of the persons appearing to be parties to a suit, where the decree rendered therein is collaterally attacked, must be determined from the face of the record."
>
> "In the examination of the record of a suit, where the decree is collaterally at-

tacked, to determine whether the Court rendering the decree had jurisdiction of the persons appearing to be parties thereto, every reasonable presumption will be indulged in favor of the jurisdiction."

"The affidavit of non-residence of a defendant required to be made before the non-residence notice is published may be made on a separate piece of paper, and need not be attached to the bill; and on collateral attack, it must be presumed that the proper affidavit was filed, although there appears to be no oath to the bill."

That the Supreme Court of the United States has often declared substantially the same doctrine laid down in these Tennessee cases, will appear from the following and many other cases in this great Court: *Mills* v. *Durgee,* 7 Cr., 484; *Voorhies* v. *Jackson,* 10 Pet., 449; *Cooper* v. *Reynolds,* 10 Wall., 308; *Penoyer* v. *Neff,* 95 U. S., 714; *Applegate* v. *Lexington,* 117 U. S., 255; *Huling* v. *Kaw Valley, Etc.,* 130 U. S., 559; *Arndt* v. *Griggs,* 134 U. S., 316; *Hanley* v. *Donohue,* 116 U. S., 114; *Andrews* v. *Andrews,* 188 U. S., 14; *Tilt* v. *Kelsey,* 207 U. S., 43; *Burbank* v. *Ernst,* 232 U. S., 162. It is the generally accepted rule with reference to the judgments and decrees of Superior Courts of general jurisdiction in any given field.

LEGAL SITUS OF CORPORATE STOCKS FOR PURPOSE OF SUCCESSION OR DISTRIBUTION.

The argument, so far, has proceeded upon the assumption that the technical legal *situs* of these stocks was immaterial, and this is true, in the sense that it is not at all *necessary* to the integrity of our position that such *situs* be held to be in Tennessee, for the reasons already indicated.

But we have suggested, as the sounder view, that the *situs* was in Tennessee (assuming, as the Tennessee Courts decided, that the domicile of the owner was there), and that, at all events, upon the assumption of the Tennessee domicile of the owner, the *situs* was in Tennessee *for the purpose of the legal succession of the title* upon the death of the owner; and it is upon this point that we now offer some further observations.

The authorities, as we have also suggested, are not at all agreed upon the exact nature and qualities of corporate stocks, in all respects, nor upon their legal *situs,* for all purposes.

Ordinarily, their *situs* is generally held to be the State or country of the corporation. But whether, for this or that special purpose, they are to be considered as following the domicile of the owner, or remaining always at the domicile of

the corporation, or whether they are to be treated as separate *choses in action,* like notes and bonds, or be assimilated to the interests of *partners,* or the interests of *common owners* of franchises and intangible things—these and other puzzling questions have arisen and been variously decided. But we are not here concerned with these questions and shall not go into them. There is, we think, substantial agreement upon the *essentials* of our contention as to the *right of succession.*

These *essentials* are two in number: (1) that corporate stocks are *personal* property, and *not* real estate—and this we understand to be everywhere conceded; and (2) that while the succession of *real estate* is fixed and controlled by the *lex rei sitate,* that of *personal property* is fixed and controlled by the *lex domicilii* of the owner —and this is everywhere conceded.

Now, it is our contention that it *necessarily* follows from these two propositions that the *domiciliary administrator* of an intestate decedent, as the representative of the distributees, *takes title as such to all of the decedent's personal property,* including his corporate stocks wherever the corporations may be located; and that the authorities support us in this contention. See authorities on this subject cited on pages 32

to 36 of our principal brief, which citations need not be repeated here.

Now, if it be assumed, as we think it must be, that the domicile of Charles Baker at his death *was in Tennessee*—as was adjudged by both the County and Chancery Courts of that State—then it follows, as a necessary consequence of the principles established by the authorities we have cited and quoted, that not only did the plaintiff in error, Mrs. Josie C. Baker, as his *domiciliary* administratrix, take *title* to the *corporate stocks* of her intestate in the corporation of Baker, Eccles & Co.; and the *debt due him* by that corporation, but the *legal situs* of both that stock and that indebtedness was *in Tennessee* for the full purposes of such legal ownership by the domiciliary representative and the succession and distribution thereof according to the laws of that State.

Any other view would manifestly lead to great confusion—to the uprooting or ignoring of fundamental principles as old as the common and civil laws; and this view is not at all impaired or weakened by the *consistent* principle that, by reason of the physical presence of the corporation and debtor in Kentucky, the latter State has the fullest jurisdiction and power to protect its own citizens, who may be *creditors* of the de-

ceased, by preventing the removal of the property until they are satisfied, and for that purpose may, if it chooses, require *administration* there and permit removal of the surplus only. But here there are no Kentucky creditors, and consequently no occasion for the exercise by that State of its acknowledged powers.

It is respectfully submitted that the judgment of the Kentucky Court of Appeals should be reversed and the cause remanded for the purpose of granting and making effectual the relief sought by the plaintiff in error.

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Attorneys.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 115.

JOSIE C. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, PLAINTIFF IN ERROR,

vs.

BAKER, ECCLES & CO. AND AUGUSTA H. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

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Of Counsel.

(24,680)

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR.

The Facts.

Since this court does not "sit to review the findings of facts made in the State court, but accepts the findings of the court of the State upon matters of fact as conclusive and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court" (Waters-Pierce

Oil Company *vs.* Texas (No. 1), 212 U. S., page 97; Quimby *vs.* Boyd, 128 U. S., page 488; Egan *vs.* Hart, 165 U. S., page 188), there should be no disagreement about the facts. However, certain statements are made in opposing counsel's brief under the title of facts that are misleading. They say the decedent at his death had in Tennessee "personal property consisting of money and rents and debts due him amounting to from one thousand to twelve hundred dollars." This fact is found by the Court of Appeals to be:

> "In view of the admitted fact that Charles Baker, at the time of his death, owned both real and personal estate in Hardin County, Tennessee."

If we look beyond the opinion of the court to the pleadings, it appears that Charles Baker and his brother jointly owned a tract of land; that the rent for the year 1912, amounting to between eight hundred and one thousand dollars, was unpaid; his undivided interest in the rent was all of the personal property owned by him in Tennessee. Again, it is stated:

> "He died suddenly on September 1st, 1912, in Humphreys County, Tennessee, while he was on his way from Paducah to Savannah."

The fact as to this, as found by the Court of Appeals, is:

> "In September, 1912, while en route to his old home in Tennessee for a visit, he died while on board a steamboat in Humphreys County. * * * About an hour before he died, he told the Captain of the steamboat on which he was being carried on his expected visit to Savannah, that he was going to Savannah and would probably stay there until after the fair, and was then coming back to Paducah and would vote for Wilson. * * * He had no business interest in Tennessee, except the land that had been given to him, and that was rented out" (Record, page 102).

Again, it is stated that the appointment of plaintiff in error as administratrix of the estate of Charles Baker by the County Court of Hardin County "is conceded by adversaries that this appointment was regular, lawful, and valid."

It is conceded that the appointment was regularly made; that the decedent owned property within the State of Tennessee and the county named, and therefore under the local law the probate court had the right to appoint an administrator of his estate. Plaintiff in error resided with her husband in Paducah, who, according to the opinion of the Court of Appeals, "died a resident of Kentucky, and accordingly the personal estate owned by him at his death, and here in controversy, had a situs in this State" (Record, page 94).

After his death she removed to Hardin County, Tennessee, carrying with her the certificates of stock owned by decedent in the Kentucky corporation, spoken of as Baker-Eccles & Company—the certificates of stock which adversary counsel say were exhibited to the Chancery Court of Tennessee; she obtained the stock from a local bank in Paducah, where it had been deposited in a strong box by the decedent. The fact of exhibiting the certificates of stock to the Tennessee court, and the manual possession thereof by the plaintiff in error, in nowise affected the situs of the property interest in said corporation, as we shall see later on.

ARGUMENT.

In the circuit court, and also in the Court of Appeals, opposing counsel vigorously urged that the judgment of the County Court of Hardin County, Tennessee, determining the domicil of the decedent was in that county, is conclusive on all persons wherever domiciled; that such court under the law of Tennessee is a court of original and superior jurisdiction in all matters of probate and settlement of decedent's estate, including the right to decide the domicil of decedent; that the adjudication by it of the domicil of the deceased concluded the defendant in error, Mrs. Augusta H. Baker, as to all property within or without the State of Tennessee. That position is now abandoned. The brief says:

> "A similar point was made and is preserved in the record on the judgment of the County Court in Tennessee, which granted the letters of administration; but conceiving that owing to the limited jurisdiction of that court and the summary and *ex parte* nature of the proceedings therein, there is ground for doubting the conclusiveness of its finding as to domicil—especially as such finding was not necessary to its lawful grant of letters of administration—we do not emphasize on this motion that aspect of the case."

Because of that position the Court of Appeals *devoted* much attention to the binding force of the county court judgment; that was also the reason why the point is extensively combated in the brief of defendants in error on the motion to dismiss. It was also claimed below that the judgment of the chancery court of Tennessee is conclusive, not only as to persons in that State served with process, and as to property within the State, but as well as to all persons wherever domiciled, whether served with process or not, and as to all property owned by the decedent at the time of his

death wherever situated. Now, it is admitted "that a personal judgment against a nonresident, upon publication or other constructive service without actual service or appearance, is void." But it is stated this "proposition is not at all vital or even involved here," because the proceedings in Tennessee in the chancery court were not "one *in rem* against the particular physically located property which may be in the hands of the administrator," nor "is it an action *in personam* against the distributees," but "the subject-matter of this suit is rather the *status* of the intestate at his death, than his estate," and thus is developed the crux of the argument.

I.

Status is a relation of a person to another or to the State. A judgment of status is, of necessity, personal. Status cannot be predicated of property; the status of an individual being fixed, the site of property is an incident thereto. The dead have no status, since they can have no relation to the living. When the decedent ceased to live his status ended; immediately title to his property passed to the distributees, subject to the claims of creditors. In a limited sense the title did not *vest* immediately, for the law endows the personal representative, administrator, with the temporary trustship of the property, which trustship carries with it the right of possession and the nominal title. If it be true that there is in law such a thing as a *judgment* of status, which in its operation is neither *in personam* nor *in rem*, it by no means advances the position of opposing counsel, for—

> "The very rule that a personal status accompanies a man everywhere, is admitted to have this qualification, that it does not militate against the law of the country, where the consequences of that status are sought to be enforced."
>
> (5 Barn. & Cres., 455; Story on Conflict of Law, page 122, section 87.)

If the proceedings in Tennessee are what adversary counsel insists, nevertheless in Kentucky, where the consequence of the judgment is sought to be reaped, it is subject to the laws of this State. It would be a most anomalous procedure if the title to property could be divested by indirection, as claimed here, when the judgment of a court obtained in the ordinary way would be void as to all persons not served with process.

The judgment of a court must, of necessity, be one that affects the person or the property of the individual, indeed no other form of judgment is known to the law, there is no such thing as a judgment of status that does not affect a person. Status relates alone to the person, and a judgment thereon, of necessity, is personal. The title to the personal property of the decedent did not lapse upon his death; it vested in some one somewhere. It is argued that it passed to the domiciliary administratrix; that, such being the case, the distributees had no interest therein, and by innuendo it is suggested that, assuming the plaintiff in error to be the domiciliary administratrix and therefore the title-holder of all the personal property of the decedent wherever located, she only was a necessary party to the litigation. The infirmity of the argument is twofold: First, the title of an administrator is by no means of that absolute and unqualified character; second, the proposition is based upon the assumption that the domicil of the deceased was in Tennessee.

II.

It is undoubtedly true that the personal estate of a deceased person vests in the domiciliary administrator, and such is the case as to property having a situs in a State foreign to the domicil of the decedent; nevertheless the rule must be taken with qualifications and exceptions to this extent: the adjudication of domicil by a court in an action where the distributees are not served with process will have

no force or effect beyond the limits of the State. Such a judgment has no extraterritorial force, nor is it true that the Kentucky judgment results in a "segregation" of the decedent's estate. The Kentucky court, in determining the devolution of the property of the decedent situated within the borders of that State, exercised a right always claimed by courts. If it be admitted the domicil of the deceased was in Tennessee, it by no means follows that a court of Kentucky is by comity required to transmit property found within its borders to the foreign administrator for distribution. The question turns upon who is the domiciliary administratrix; that is a fact which was considered and decided by the Kentucky court.

> "Where administrators are appointed in different States, personal property coming into the hands of each administrator in such States, is made subservient to the rights of creditors, legatees and distributees who are resident within the Country."
>
> (Story on Conflict of Law, section 513, page 843.)

This question was exhaustively considered by Judge Story in Harvey *vs.* Richards, 1 Mason Reports, 381. The argument is made there that it is impracticable to "segregate" an estate; that it must be treated in law as a unit, and as a consequence thereof must finally be distributed by one administrator. The answer to the argument is as follows:

> "The rule, that distribution shall be according to the law of the domicil of the deceased, is not founded merely upon the notion that movables have no situs, and therefore follow the person of the proprietor, even interpreting that maxim in its true sense, that personal property is subject to that law which governs the person of the owner. * * * The correct result of these considerations upon principle would seem to be, that whether the court here ought to decree distribution or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion,

depending upon the particular circumstances of each case; that there ought to be no universal rule upon this subject; but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons, having a title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities. It is further objected, that a rule, which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction since there are an infinite variety of cases in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. * * * Another objection, addressed more pointedly to a class of cases like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are separate, what desperate, and, finally ascertaining what is the residue to be distributed, and who are the next of kin *entitled to share*. And to add to our embarrassment, we are told, that we cannot compel the foreign executor to render any accounts in our courts. I agree at once, that this cannot be done, if he is not here; but I utterly deny, that the administrator here cannot be compelled to account to any competent court for all the assets, which he has received under the authority of our laws. And if the foreign executor chooses to lie by, and refuses to render any account of the foreign funds in his hands, so far as to enable the court here to ascertain whether the funds are wanted abroad for the payment of debts or legacies, or not, he has no right to complain, if the court refuses to remit the assets, and distributes them among those who may legally claim them. And as to settling the estate, or ascertaining who are the distributees, there is no more difficulty than often falls to our lot in many cases, arising under the ordinary probate proceedings."

The decision of the Court of Appeals of Kentucky did not announce a new doctrine. If there was a "segregation," it resulted from the decision of the Tennessee court in fixing the domicil of the decedent in that State in a suit wherein the distributees were not served with process. The effect of the argument of opposing counsel is that a rule of law should give way to expediency; that, as it is impracticable to bring non-residents before the court, the judgment of the Tennessee court should be upheld, not because it is right, but on account of the "confusion" which will ensue if another court shall consider the question therein decided. As remarked by this court in a celebrated case, rules of law may not be set aside "by the summary logic of ifs and syllogisms."

The purpose of a judicial inquiry is to truthfully decide a controverted fact, and the inability to induce all interested persons to submit to the jurisdiction of the particular court considering the disputed matter and to abide the decision, right or wrong, is no reason for the abrogation of a long-established rule of law. No amount of tergiversation or elusive sophistry can obscure the position assumed by opposing counsel—that the judgment of the Tennessee court should be given effect in Kentucky, although the persons to be affected here did not appear there, nor were they served with process, nor was the property within the jurisdiction of that court. What the Kentucky courts will do with the property of the decedent in this State is a matter for its determination; neither comity or law requires it to work an injustice to its own citizens or to deprive them of property to which under our law they are entitled. The matter is one of judicial discretion of the court.

(Malcomson *vs.* Sherrill & Burton, L. R. A., New Series, 1915-*a*, page 431.)

It is a "mere question of expediency" (Sanford *vs.* Thompson, 18 Ga., 554).

There is no universal rule on the subject. The court will decree a distribution among resident heirs or remit to a foreign administrator, as the case may be. If by remitting to a foreign administrator an injustice will be done to local distributees, the rule is to distribute in the State having custody of the property. If under all the facts of the case the foreign administrator can best distribute, custody of the property will be awarded to him. This is true, even though the principal administrator is recognized as having title to all of the personal property of the decedent.

III.

It is repeatedly asserted the plaintiff in error is the domiciliary administratrix, but that is the question for decision. The Kentucky court found the decedent to be domiciled in and a resident of this State. As a consequence of that finding, the defendant in error, Mrs. Augusta H. Baker, becomes the domiciliary administratrix. The question of domicil being one of fact; and the Kentucky court having determined the fact, the matter is concluded here. The Tennessee court likewise considered the question of domicil and reached a conclusion thereon, but the Kentucky distributees did not appear in the Tennessee action, nor were they served with process. The Tennessee court undoubtedly had the right to consider the question and to adjudicate thereon; so had the Kentucky court. So the question recurs, not upon the *correctness* of the decision of the *question of domicil,* but the force and effect to be given here to the Tennessee judgment deciding the question. It is within the rule announced in Pennoyer *vs.* Neff, 95 U. S., page 714; National Exchange Bank *vs.* Wiley, 195 U. S., page 257; D'cary *vs.* Ketchem, 11 Howard, 165, by this court, and Williams *vs.* Preston, 3 J. J. Marshall, 600; Fletcher *vs.* Terrell, 9 Dana, 337; Cobb *vs.* Haynes, 8 B. Monroe, 139; Biensenthall *vs.* Williams, 1 Duval, 332, by the Court of Appeals of Kentucky.

Title to or right of possession of property is not a jurisdictional fact. The argument that the Tennessee court having decided the plaintiff in error is the domiciliary administratrix, and consequently the title-holder of the personal property of the decedent, leads opposing counsel into a quagmire. We shall presently see the Kentucky court decided the defendant in error, Mrs. Augusta H. Baker, is the domiciliary administratrix before the Tennessee court considered the matter. The title of the domiciliary administratrix is one of trust for administration only. The distributees, even before the appointment of an administrator, may invoke the aid of a court to prevent waste, destruction, or damage to the personal property (Ruling Case Law, vol. 11, page 61).

> "The title is not in his own right, but as a trustee for the benefit of those having claims against the estate and the distributees."
> 18 Cyc., page 205.
> Blackman *vs.* Bachelor, 2 Iowa, 118.

In the case of Carroll *vs.* U. S., 13 Wallace, page 151, the question was incidentally considered, and this court said:

> "True, the ownership was not absolute, nor was her right to the proceeds absolute. She could claim only in a representative capacity; first in right of the intestate; and secondly, as trustee for creditors and distributees."

Opposing counsel is driven to emphasize the rule of law investing the domiciliary administratrix with title to personal property; for the reason that it is sought to be shown the Kentucky distributees had no interest in the personal estate of the decedent wherever situated, and therefore are not necessary parties to the Tennessee suit.

IV.

With the view of showing the personal estate of the decedent was in the State of Tennessee, it is repeatedly stated in the brief of opposing counsel that the certificates of stock held by him in the Kentucky corporation were in the possession of the plaintiff in error and were exhibited by her to the court in Tennessee. The circumstances under which she acquired possession of these certificates appear in the pleadings. The opinion of the Court of Appeals of Kentucky treating the matter is immaterial, and does not set forth the manner in which they were acquired. It recognized the situs of the property represented by said certificates to be in Kentucky in any event.

> "For the purposes of administration, the situs of a certificate of stock of a corporation owned by a decedent is in the State where the corporation was organized and has its principal place of business, since it is the situs of the corporation and not the domicil of the holder of the certificate that determines."
>
> (Ruling Case Law, vol. 11, page 539.)

In Grayson *vs.* Robertson, 25 Southern Reporter, page 229, the Supreme Court of Alabama says:

> "It is the situs of the corporation, not the domicil of the holder of the certificate that determines."

And in the list of authorities supporting the text the case of Young *vs.* Iron Company, 85 Tenn., 189, is referred to. The Alabama court says:

> "Such was the ruling of the Supreme Court of Tennessee in a case involving the attachment of shares of stock in a foreign corporation."

The Kentucky court found the fact to be that substantially

all of the personal property of the decedent was in Kentucky; it treated the certificates of stock, carried by the plaintiff in error from the State after the death of the decedent, as of no moment, since the situs of the property was here.

V.

Decision of the Kentucky Court Was Right.

The defendant in error, Mrs. Augusta H. Baker, administratrix of Charles Baker, was appointed by the County Court of McCracken County on the 27th day of November, 1912, and on the 3d day of December, 1912, as such administratrix, she commenced an action in the circuit court in Kentucky to distribute the estate of the decedent and to fix his place of domicil. Substantially all of the personal property was in Kentucky, and the filing of the action in the circuit court placed the property *in custodia legis*. For all purposes, administration, distribution, payment of creditors, the Kentucky court had in its custody the personal property of the decedent. Incident to the distribution and settlement of the estatee it had the undoubted right to, indeed was required to, determine the domicil of the decedent and ascertain the distributees. This suit progressed to judgment on the 13th day of February, 1913, wherein it was adjudged and determined the decedent was domiciled in and a resident of Kentucky, and distribution of the personal estate should be made according to the law of Kentucky. While this action was pending in Kentucky, and on the 28th day of December, 1912, the plaintiff in error, individually and as administratrix of the decedent, commenced her action in the chancery court of Tennessee, and on the 2d day of May, 1913, that cause progressed to judgment in the Tennessee court. It was therein adjudged that decedent was a citizen of and domiciled in Tennessee at the time of his death. Armed with the Tennessee judgment, the plaintiff in error

came to Kentucky and invoked the aid of the court to carry into effect the Tennessee judgment. The defendant in error, Mrs. Augusta L. Baker, administratrix of the decedent, came into that suit and exhibited the Kentucky judgment, thus bringing before the Kentucky court all of the distributees of the decedent. At the instance of the plaintiff in error the Kentucky court reopened its former judgment and again examined the question of domicil, and in doing so sought and obtained exhaustive proof upon the controverted fact, and with the record in this condition reached once more the same conclusion. The Kentucky court had custody of the property, and it appears of record all interested distributees were before that court. Having custody of the property and of the persons interested, why should it forego the right to determine, at the instance of its own citizens, the disputed fact? It is a familiar rule of law that a court, having acquired jurisdiction of a person or subject-matter, will hear and determine all questions involved in the action. The policy of the law is to compose misunderstandings, and it would be strange indeed if comity or law required courts of Kentucky to deny a hearing to its own citizens upon so nice a distinction. If the plaintiff in error is the domiciliary administratrix, it became her duty to conserve the personal estate of the decedent, and, assuming that she fulfilled her duty, she must have known the greater portion of the personal estate was here; she must also have known the court of Kentucky had custody of the property and was proceeding to adjudicate therein. It is not combated that the plaintiff in error had actual notice of the pendency of the Kentucky suit, but it is said the proceedings, so far as she is concerned, are of no avail because she was not properly before the court by constructive service. We conceded it, but this does not help opposing counsel, for, whether the plaintiff in error was before the Kentucky court or not, the custody of the property was undoubtedly in such court; so when she came to Kentucky with

the Tennessee judgment the matter, so far as she is concerned, was undetermined.

The Kentucky court, having custody of the property of the decedent in an action commenced before any foreign judgment was obtained, is asked to surrender its jurisdiction and to forego a determination of the litigated matter because a foreign court had *first* determined the question, determined it in an action where the Kentucky distributees are not served with process and did not appear.

If the "confusion" complained of is to be avoided, the rule of law giving to the court first acquiring custody of the property or jurisdiction of the person the right to adjudge therein should be adhered to. The course of the Tennessee lawsuit was unusual from its inception. The original bill stated the defendant in error, Mrs. Augusta H. Baker, mother of the decedent, claimed an interest in the estate of the decedent, yet when that judgment is brought to Kentucky she is not even made a party to the litigation. She had possession of the property; she was the administratrix, rightfully appointed by the Kentucky courts, and claiming a portion of the estate as her own. These facts were known to the plaintiff in error, as appears from the record; nevertheless the Kentucky court is asked to divest her of title to property in an action to which she is not a party. The proceedings manifest an effort to avoid the real question. The issue sought to be framed was in truth a false one. The adroit effort to deprive the defendant in error of her distributive share was frustrated, for she came into the action and subjected herself and the property held by her as administratrix to the jurisdiction of the Kentucky court. There is nothing novel here; each administratrix claims to be the domiciliary one; the matter is submitted to the Kentucky court in an action to which each administratrix is a party. The right to determine the question presented is not combated, but it is said a foreign court has considered the matter, even though one of the claimants was

not served with process. Bearing in mind that it is agreed a judgment *in personam* without service of process is void, that a judgment *in rem* as to property beyond the jurisdiction of the court is ineffective, we need not seek far for an answer to the argument.

We submit that the judgment of the Kentucky Court of Appeals was right.

Respectfully submitted,

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